Supreme Court, U.S.
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CASE NO:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ADRIAN ROGERS,
Petitioner,
-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit create conflict with other Circuit Courts of Appeal in its interpretation and application of this Court's decision in Wade v. United States, 112 S.Ct. 1840 (1992), by failing to recognize or apply the separate criteria in Wade authorizing a Federal Court to independently review prosecutor's decision not to seek a reduced sentence for "substantial assistance" provided by a criminal defendant, when that decision is irrational or arbitrary.

2. Did the Eleventh Circuit ignore or wrongfully fail to correctly apply this Court's decision in Wade v. United States, 112 S.Ct. 1840 (1992), when it failed to apply that part of the criteria announced in Wade authorizing Federal court review of a prosecutorial decision not to seek a reduced sentence for a criminal defendant under §5K1.1, United States Sentencing Guidelines (USSG) when such a determination was arbitrary?

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No:_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1993

ADRIAN ROGERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, affirming the judgment of the District Court for the Southern District of Florida, is unpublished and is reproduced as Appendix A.1. A copy of the Order denying Petitioner's Petition for Rehearing is attached as Appendix A.4.

JURISDICTION

The opinion of the Eleventh Circuit was issued on March 12, 1993. Petitioner filed timely for rehearing, and this Petition was denied by an Order issued on April 15, 1993. Jurisdiction is properly invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer...nor be deprived of life, liberty, or property, without Due Process of Law...

18 USC Section 3553(e):

> Limited Authority to Impose a Sentence Below a Statutory Minimum: Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or

> prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to Section 994 of Title 28, United States Code.

United States Sentencing Guidelines, Section 5K1.1

Substantial Assistant to Authorities (Policy Statement):

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

STATEMENT OF THE CASE

Petitioner was indicted in July, 1990, and charged with conspiracy to possess with intent to distribute more than five kilograms of cocaine, and possession of cocaine with intent to distribute, in the United States District Court, Southern District of Florida. In May, 1991,

Petitioner and Respondent entered into a plea agreement, with

the Government agreeing to dismiss the substantive possession count in exchange for Petitioner's plea to conspiracy. In his plea agreement, Petitioner agreed to provide substantial assistance, in the form of "providing truthful information and testimony about any criminal offenses concerning which he has knowledge", and appearing at various grand jury and trial proceedings as required. The Government retained discretion to evaluate the extent of Appellant's cooperation, and to move to mitigate Appellant's sentence under §5K1.1, United States Sentencing Guidelines (USSG) for substantial assistance. The Government acknowledged in its discovery materials that beginning at the time of his arrest, Petitioner provided substantial information about his knowledge of other individuals involved in drug trafficking operations, both past and current, and their methods of operation. This information was initially provided without any promises or assurances from the

Government of leniency or mitigation in sentence. Petitioner subsequently informed the FBI of his involvement in about four

to five transactions involving 10-15 kilos of cocaine on each occasion. Petitioner gave names, ages, height and weight, former jobs and former residences of his supplier ("Lamingo"), his buyer ("Latcho") and the individual who was in charge of these operations ("Hugo"). Rogers detailed the method of operation, and provided documents from his home, including records of sales of real estate to Latcho, that helped to identify Latcho. Rogers further provided specific information on the dates, quantities and prices of cocaine that he received and sold, and methods of contact and code words used to indicate how much quantity Rogers wanted at different times. Rogers also told the FBI the types of vehicles used to transport cocaine, the amounts usually transported, and specific information about the transport and storage of cocaine between Wilson, North Carolina and Okeechobee, Florida. Petitioner provided information on bank accounts and beeper numbers of his suppliers, and also related that he had helped bond Lamingo out of jail, on a Dade County charge, approximately ten months before his arrest.

Petitioner's December 20, 1991 sentencing hearing preceded this Court's decision in Wade, supra. At this sentencing hearing, the Government informed Rogers' counsel that no substantial assistance motion would be filed under §5K1.1, USSG. Petitioner challenged the good faith of the government, in failing to move for reduction of Appellant's sentence for his substantial assistance, and maintained that even in the absence of a Government motion, the District Court could and should consider the issue of the Government's bad faith, in refusing to file a §5K1.1 Motion. Petitioner sought to proffer the testimony of the lead FBI Agent in charge of Petitioner's case. After initially agreeing to allow this, District Judge Gonzalez limited Petitioner to a proffer through counsel only, stating that testimony on the issue was futile. The District Judge denied Petitioner's Motion

to mitigate sentence, concluding that he had no power or authority to even consider such a motion, in the absence of a "substantial assistance" motion filed by the Government under

§5K1.1.

Petitioner proffered through counsel the extent of his substantial assistance. This proffer included additional information that had been provided to the FBI under the plea agreement, including the names of 34 people involved in past and present drug trafficking in Florida, North Carolina and the country of Columbia. These individuals included Petitioner's associates in the North Carolina to Florida operation, two of whom were arrested after Petitioner named them. Petitioner named individuals he worked with on previous drug operations in Okeechobee County, Florida where he lived and worked, and their method of "airdrop" of cocaine. Petitioner identified his original supplier of cocaine and the supplier's residence. Petitioner named "crack" dealers in Ft. Pierce, Florida. Petitioner also provided phone, beeper and license tag numbers of other of his former cohorts and associates.

Besides proffering this information, Petitioner made specific allegations and proffers of information about the motives

and efforts of the Government in its decision not to seek reduction of his sentence. Petitioner maintained that the prosecution and law enforcement did not even substantially attempt to independently examine, evaluate or share Petitioner's information amongst themselves, or with other state, local or Federal law enforcement agency. Petitioner accused the Government of ignoring his information, by not making any good faith attempt to even determine the worth of Rogers' information. Rogers alleged that a Government agent had stated there was no time or inclination by Federal law enforcement to evaluate or follow-up on information about "wetbacks" who transported cocaine. Rogers further alleged that the Government was additionally motivated by its lack of regard for the absence of any "big fish" amongst those names provided for Rogers.

Despite this proffer, the District Court did not independently evaluate the Government's exercise of discretion not to seek a reduced sentence, following and citing Eleventh Circuit precedent prohibiting such inquiry without

a Government motion. The District Court sentenced Petitioner to 188 months in prison, within the guidelines range considered applicable by the Court.

Petitioner filed a direct appeal of his conviction and sentence to the U.S. Court of Appeals for the Eleventh Circuit, under 28 USC Section 1291. In its brief to the Eleventh Circuit, Petitioner noted that this Court's decision in United States v. Wade, 112 S.Ct. 1840 (1992) had been issued after Petitioner's sentencing hearing. Petitioner specifically argued that this Court's Wade opinion provided the authority the District Court judge concluded that he did not have to examine the Government's motives and consider Petitioner's request for reduced sentence. Petitioner sought a remand for consideration by the District Court of the merits of this sentencing issue. Petitioner further alleged that the Government's decision not to seek a reduced sentence was based on both unconstitutional motives and "bad faith" under Wade. Eleventh Circuit, Appellant's Initial Brief, at ppg.

14-24.

In its ruling, the Eleventh Circuit acknowledged that the Wade ruling had "modified the absolute bar" to consideration and examination by Federal courts of a prosecutor's determination not to file a motion for sentencing departure under the Federal Guidelines. Appendix A.1. However, the Eleventh Circuit panel determined that Petitioner's proffer did not sufficiently demonstrate a "threshold showing" of unconstitutional motive by the Government. Id. The panel opinion contained no discussion, citation or apparent application of Petitioner's argument based on the "arbitrariness" prong of Wade.

REASONS FOR GRANTING THE WRIT

I. ELEVENTH CIRCUIT INTERPRETED AND APPLIED THIS COURT'S DECISION IN WADE v. UNITED STATES, 112 S.Ct. 1840 (1992) IN MANNER CREATING CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL WHEN IT FAILED TO RECOGNIZE OR APPLY THIS COURT'S SEPARATE CRITERIA IN WADE, AUTHORIZING

INDEPENDENT FEDERAL COURT REVIEW OF A PROSECUTOR'S DECISION NOT TO SEEK REDUCED SENTENCE FOR A DEFENDANT'S "SUBSTANTIAL ASSISTANCE" WHEN PROSECUTOR'S DECISION IS IRRATIONAL OR ARBITRARY

A fundamental basis for this Court's acceptance of certiorari jurisdiction is that a Federal appeals court has "rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter". Rule 10.1(a), Rules of the Supreme Court (1993). The Eleventh Circuit failed to correctly apply the complete criteria for Federal court review of a prosecutor's determination not to request a reduced sentence for a criminal defendant, based on "substantial assistance". Wade v. United States, 112 S.Ct. 1840 (1992). This error conflicts with other appellate court's interpretation and application of this Court's Wade opinion, supra, requiring that this Court accept review to resolve this conflict.

The Wade decision for the first time, authorized Federal

District Courts to review the appropriety of a prosecutor's exercise of discretion in not seeking a reduced sentence under §5K1.1, USSG, Wade, 118 S.Ct., supra, at 1843. This Court made it clear that if such a prosecutorial determination was based on an "Unconstitutional motive" such as racial or religious discrimination, a Federal court could exercise authority and grant relief to a criminal defendant. Wade, at 1843-1844. Just as clearly and unmistakably, this Court further authorized review of such a prosecutorial decision based on whether this decision was "rational" and not arbitrary. Wade, at 1844. This Court created this criterion, independent of the "Unconstitutional motive" test, which is apparent from this court's reference to prior appellate decisions authorizing judicial intervention to protect criminal defendants from Government determinations made in bad faith. Wade, at 1844; United States v. Doe, 934 F.2d 353, 358, 361 (D.C.Cir. 1991); United States v. Laguardia, 902 F.2d 1010, 1017 (1st Cir. 1990). Wade clearly authorizes a Federal court, on motion or request by a defendant challenging the lack of a §5K1.1

motion by the Government, to evaluate whether the Government 's decision resulted from a "rational assessment" of facts and circumstances surrounding such "assistance". Id.

Other Court of Appeals decisions have confirmed that District Courts can evaluate the "rationality" of a prosecutor's determination not to request a reduced sentence under Wade, if appropriately challenged by a defendant. The Second, Seventh, Eighth and Ninth Circuits, in decisions since Wade, have all interpreted Wade to require application of this "rationality" review, aside from review for discriminatory motion. United States v. Romsey, 975 F.2d 556, 558 (8th Cir. 1992)(Federal court has authority to review refusals to file §5K(1.1 motions, based on "irrational conduct" or discrimination); United States v. Delgado-Cardenas, 974 F.2d 123, 126 (9th Cir. 1992)(Wade review applies to suspect or irrational reasons for prosecutorial decision not to file); United States v. Gonzalez, 970 F.2d 1055, 1103 (2nd Cir. 1992)(decision not to file §5K1.1 Motion reviewable for misconduct or bad faith); United States v.

Egan, 966 F.2d 328, 332 (7th Cir. 1992)(rejecting Government's argument that Wade limited to discriminatory refusals, noting Wade authorization to review for whether Government's position was irrationally or arbitrarily motivated). In each of these decisions, appellate courts reviewed the Record, so as to apply the "rationality" aspect of the Wade test. Id.; see also United States v. Shrewsberry, 980 F.2d 1290, 1297 (9th Cir. 1992); United States v. Knights, 968 F.2d 1483, 1488 (2nd Cir. 1992); United States v. Vilchez, 967 F.2d 1351, 1355-1356 (9th Cir. 1992).

In this case, the Eleventh Circuit made no mention, reference or application of this part of Wade. Appendix A-1. The Eleventh Circuit's analysis of Wade erroneously included the "unconstitutional motive" test alone:

> "Although the Supreme Court has modified the absolute ban to sentencing courts examining the refusal of the government to file a motion for a downward

> departure based upon substantial assistance, such must be based upon an unconstitutional motive." Wade, Rogers, Slipop, at 2 (App., A.1, at 2), emphasis added.

No further analysis was conducted, despite Petitioner's clear argument that, inter alia, the Government had not even conveyed Petitioner's information to Federal or State law enforcement, much less investigated or analyzed it. Reply Brief, Eleventh Circuit at 3-6; Initial Brief, Eleventh Circuit at 20-21. Petitioner definitely alleged the absence of an informed, reasonable or rational judgment by the Government in refusing to file a §5K1.1 Motion, requiring an evaluation and analysis that was not done by either the District Court or the Eleventh Circuit.

The Eleventh Circuit's failure to recognize or review the Record, to determine if Appellant's proffer met the test for rationality under Wade, directly

conflicts with the decisions cited herein. It is crucial that on a sentencing issue of such importance as the scope and criteria for judicial review of a Government's decision not to recommend a reduced sentence for "substantial assistance", the proper parameters and limits of such review should be uniformly applied. This Court should grant certiorari to review and clarify the appropriate standards under Wade.

II. ELEVENTH CIRCUIT'S ERRONEOUS INTERPRETATION AND APPLICATION OF THIS COURT'S WADE DECISION, CREATED CONFLICT ON FEDERAL QUESTION DECIDED IN WADE BY THIS COURT

As already argued, the Eleventh Circuit's application of Wade, to the facts in this case was incomplete based on an

incorrect interpretation of the appropriate criteria and standards announced in Wade.

Pt.I, supra. The Eleventh Circuit's opinion conflicts with this Court's Wade decision, on the important Federal question of the proper basis for judicial review of a prosecutor's decision not to request sentence reduction in situations of substantial assistance by criminal defendants. Rule 10.1(c), Rules of the Supreme Court (1993). This Court should accept certiorari review to resolve this conflict and to insure correct rendition and application of Wade by all circuit courts of appeal.

CONCLUSION

For these reasons, this Court should grant a Writ of Certiorari to review the opinion and ruling of the Eleventh Circuit in this case.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

ADRIAN ROGERS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I CERTIFY that on this ____ day of JULY, 1993, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, copies of the

(1) Petition for Writ of Certiorari, and

(2) Certificate of Service

were served by mail delivery, upon the United States Attorney for the Southern District of Florida, (name & address) and upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-4005
Non-Argument Calendar

D. C. Docket No: 90-14027-CR-JAG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADRIAN ROGERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 12, 1993)

Before FAY, EDMONDSON and CARNES, Circuit Judges.

PER CURIAM:

Convicted, by way of a guilty plea, of conspiracy to possess with intent to distribute cocaine, appellant suggests error in the imposition of his sentence. He raises three specific issues:

1. Denial of request for downward departure for substantial assistance in the absence of government motion

2. Enhancement of base offense level for leadership role in the offense

Although the Supreme Court has modified the absolute bar to sentencing courts examining the refusal of the government to file a motion for a downward departure based upon substantial assistance, such must be based upon an unconstitutional motive. Wade v. United States, ___ U.S. ___, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992). This record shows that appellant simply failed to make a threshold showing of any such motive. In the absence of such, the district court

correctly concluded that it was without authority to consider the matter.

The record also provides ample support for the findings made as to the quantity of cocaine involved and the role of appellant in the criminal activity.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 92-4005

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADRIAN ROGERS,

Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING

BEFORE: FAY, EDMONDSON and CARNES, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellant Adrian Rogers is denied.

ENTERED FOR THE COURT:

s/_____
Peter Fay
United States Circuit Judge

(2)

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No. 93-96

In the Supreme Court of the United States

OCTOBER TERM, 1993

ADRIAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly declined to review the prosecutor's decision not to file a substantial assistance motion under 18 U.S.C. 3553(e) and Sentencing Guidelines § 5K1.1, which would have permitted the district court to depart downward at sentencing.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-96

ADRIAN ROGERS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the judgment is noted at 988 F.2d 1217 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1993. A petition for rehearing was denied on April 15, 1993. Pet. App. A4. The petition for a writ of certiorari was filed on July 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner pleaded guilty in the United States District Court for the Southern District of Florida to the charge of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Pet. 3-4; Pet. App. A2. His arrest resulted from substantial cocaine purchases he made from a co-defendant, Lester Matchett. In early July 1990, confidential informant Larry Jackson had contacted Matchett and stated that he had 72 kilograms of nearly pure cocaine for sale. Jackson promised Matchett a $72,000 commission if Matchett could find a purchaser for the cocaine. Matchett thereafter contacted petitioner regarding the prospective deal.[1] Petitioner agreed to buy five kilograms of the cocaine for $17,000 per kilogram, with the understanding that petitioner would buy the remainder of the cocaine if he was satisfied with its quality. On July 17, 1990, petitioner gave Matchett $80,000 in cash that petitioner had taken from his safety deposit box. After removing his commission, Matchett delivered the remaining money to an undercover officer posing as Jackson's "supplier." Matchett was immediately arrested. He later cooperated with law enforcement officers and participated in a controlled delivery of six kilograms of cocaine to petitioner that resulted in petitioner's arrest and the seizure of approximately $196,000 in cash from petitioner's possession. Gov't C.A. Br. 4-6.

Following his arrest, petitioner told interrogating officers that he had trafficked in multi-kilogram quantities of cocaine on several previous occasions. Describing those episodes, petitioner stated that a man known as "Lamingo" typically brokered his purchases of cocaine

[1] Matchett knew that petitioner, a long-time acquaintance of his, had previously been involved in drug trafficking. Gov't C.A. Br. 3.

on credit from Colombian suppliers in Miami and that he subsequently sold the bulk quantities of cocaine in North Carolina to a man known as "Latcho." Although petitioner did not know the last names of either "Lamingo" or "Latcho," he provided officers with information that might aid their identification of "Lamingo" and "Latcho." Petitioner further provided the officers with the telephone numbers of the Colombians with whom he dealt. See Gov't C.A. Br. 7-11.

2. As part of his later plea agreement with the government, petitioner agreed that he would "cooperate fully" with federal authorities by "providing truthful information and testimony about any criminal offenses concerning which he has knowledge." R.E. Exh. C at 2.[2] The plea agreement further stated (*id.* at 3):

> The United States reserves the right to evaluate the nature and extent of [petitioner's] cooperation and to advise the court of the nature and extent of such cooperation at the time of sentencing. If, in the sole discretion of the United States, the circumstances of [petitioner's] cooperation warrant a departure by the court from the guideline and/or mandatory minimum sentence, the government may, but is not obliged to, make a motion pursuant to 5K1.1 of the Sentencing Guidelines and/or Title 18, United States Code, Section 3553(e), stating that [petitioner] has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

3. Prior to sentencing, the government informed petitioner's counsel that it did not consider petitioner's cooperation adequate to warrant the filing of a substantial

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[2] "R.E." refers to the Record Excerpts filed in the court of appeals.

assistance motion. Defense counsel then filed a "Motion to Mitigate or Reduce Sentence" that recited the information that petitioner had provided and alleged that the government violated its "good faith obligations under the plea agreement" by its "unwillingness to recognize [petitioner's] contribution[], because law enforcement [officers] did not catch a more important 'player' in the drug trade." See Gov't C.A. Br. 12-13. At sentencing, defense counsel moved for a downward departure on the ground that the government had acted in bad faith in refusing to file a substantial assistance motion. *Id.* at 13.

In response, the prosecutor explained that petitioner's cooperation was considered not to be substantial because (1) much of the information furnished by petitioner was already known to law enforcement authorities; (2) several arrests of drug suspects in North Carolina, for which petitioner claimed credit, had not been based on information provided by petitioner; (3) petitioner's cooperation was grudgingly given, marked by half-truths, and—on one occasion—deliberately calculated to shield the criminal activities of a suspect from discovery; and (4) many of the persons about whom petitioner offered information were his own couriers. See Gov't C.A. Br. 13-14. Although the quality of petitioner's cooperation did not merit the filing of a substantial assistance motion to permit a downward departure, the prosecutor nonetheless recommended that petitioner's cooperation be taken into account in setting his sentence within the applicable Guidelines range. *Id.* at 14.

After pertinent adjustments were made, petitioner's Guidelines range indicated a term of 188-235 months' imprisonment.[3] The district court refused to depart

[3] In addition, petitioner's offense of conviction was subject to a statutory mandatory minimum term of ten years' imprisonment. See 21 U.S.C. 841(b)(1)(A).

below the indicated range. Instead, it sentenced petitioner to 188 months' imprisonment, the lowest sentence it could have imposed within the Guidelines range.

4. The court of appeals affirmed in a brief per curiam opinion. Pet. App. A1-A3. The court of appeals recognized explicitly that this Court "has modified the absolute bar to sentencing courts examining the refusal of the government to file a motion for a downward departure based upon substantial assistance." *Id.* at A2. The court of appeals acknowledged that "such must be based upon an unconstitutional motive" on the part of the prosecutor. *Ibid.* Yet, because petitioner "simply failed to make a threshold showing of any such motive" under the circumstances of this case, the court of appeals held that the sentencing court "correctly concluded that it was without authority to consider the matter" of a downward departure based on petitioner's asserted cooperation. *Id.* at A2-A3.

ARGUMENT

The decision of the court of appeals is correct. Contrary to petitioner's assertions (Pet. 10-11, 13-14), the decision does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is unwarranted.

1. Under the terms of his plea agreement, petitioner specifically agreed that the government retained the "sole discretion" "to evaluate the nature and extent of [his] cooperation" and to determine whether "the circumstances of [his] cooperation warrant[ed] a departure by the court from the guidelines and/or mandatory minimum sentence." R.E. Exh. C at 3. Petitioner concedes that the government retained this discretion. Pet. 4. Moreover, petitioner "expressly waive[d] his right to appeal his sentence on any ground" and further "agree[d]

not to contest his sentence or the manner in which it was determined in any post-conviction proceeding." R.E. Exh. C at 4. A plea agreement that requires a defendant to waive all of his appeal rights is enforceable. See, *e.g.*, *United States* v. *Melancon*, 972 F.2d 566 (5th Cir. 1992); *United States* v. *Bolinger*, 940 F.2d 478, 479-480 (9th Cir. 1991); *United States* v. *Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990). Petitioner's agreement, which barred petitioner from appealing any alleged sentencing error, including the government's refusal to file a substantial assistance motion, was therefore valid and binding on him. Petitioner's waiver of his right to appeal the government's refusal to file a substantial assistance motion provided a sufficient basis for affirmance of his sentence.

2. In any event, a bare allegation by a defendant that he has provided substantial assistance to the government is not sufficient to trigger the government's duty to file a substantial assistance motion. Nor does such a bare allegation suffice to allow a court to depart downward in the absence of a motion by the government. Section 3553(e) of Title 18 provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Similarly, Sentencing Guidelines § 5K1.1 provides that a court may depart from the Guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance" to the government. Both Section 3553(e) and Sentencing Guidelines § 5K1.1 "give[] the Government a power, not a duty, to file a motion when a defendant has substantially assisted." *Wade* v. *United States*, 112 S. Ct. 1840, 1843 (1992).

3. This Court recognized in *Wade* that a prosecutor's exercise of discretion under Section 3553(e) and Sentenc-

ing Guidelines § 5K1.1 is subject to limited judicial review: "we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." 112 S. Ct. at 1843-1844. As this Court explained, the government's refusal to file is subject to judicial review only if "the Government refused to file a motion for suspect reasons such as [the defendant's] race or his religion" or "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id.* at 1844. An allegation that a defendant provided substantial assistance but that the government failed to file a substantial assistance motion does not "entitle a defendant to a remedy or even to discovery or an evidentiary hearing," nor would "additional but generalized allegations of improper motive." *Ibid.*

The court of appeals correctly observed that petitioner "failed to make a threshold showing" that the prosecutor's refusal to file a substantial assistance motion was in any way predicated upon an unconstitutional motivation—whether involving a suspect category such as petitioner's race[4] or entailing an irrational basis. Petitioner particularly failed to demonstrate that the government's refusal to file a substantial assistance motion was arbitrary and hence unconstitutional in the sense that it "was not rationally related to any legitimate Government end." *Wade*, 112 S. Ct. at 1844. The

[4] Petitioner alleges (Pet. 8) that a federal agent stated that the government had neither the time nor the inclination to follow up on information supplied by petitioner concerning "wetbacks" who transported cocaine for petitioner. Even if given credence, petitioner's allegation fails to establish that the government's refusal to file a substantial assistance motion was based on suspect reasons that related to *his* race or ethnicity. See *Wade*, 112 S. Ct. at 1844.

explanation offered by the prosecutor at the sentencing hearing provided an entirely rational reason for the government's refusal to file a motion; petitioner himself tacitly recognized in his pleadings that the government's decision was predicated, at least in part, on the fact that "law enforcement did not catch a more important 'player' in the drug trade" as a result of petitioner's cooperation. See Gov't C.A. Br. 12. As the courts of appeals following *Wade* have held, an allegation based on a claim that the prosecutor incorrectly evaluated the significance of a defendant's cooperation falls far short of indicating a constitutional violation so as to permit judicial review of a prosecutor's refusal to file a substantial assistance motion. See, *e.g.*, *United States* v. *Favara*, 987 F.2d 538, 539-540 (8th Cir. 1993); *United States* v. *Shrewsberry*, 980 F.2d 1296, 1297-1298 (9th Cir. 1992), cert. denied, 114 S. Ct. 120 (1993); *United States* v. *Romsey*, 975 F.2d 556, 557-558 (8th Cir. 1992); *United States* v. *Higgins*, 967 F.2d 841, 844-845 (3d Cir. 1992); *United States* v. *Urbani*, 967 F.2d 106, 109-110 (5th Cir. 1992); *United States* v. *Egan*, 966 F.2d 328, 332 (7th Cir. 1992), cert. denied, 113 S. Ct. 1021 (1993).[5]

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[5] In *Urbani*, the court of appeals explained (967 F.2d at 110):

> [A]lthough a defendant might conceivably state grounds for relief by alleging that refusal to move for a departure under section 5K1.1 was "arbitrary" because it was based on his membership in an identified group, or on some [other] specified characteristic, that the government has no possibly legitimate grounds for treating in a discriminatory manner, Urbani's unadorned allegation of general arbitrariness must fail. * * * [I]t is difficult to see how his claim indicates anything more than his disagreement with the government's decision and an invitation to the district court to similarly disagree, which is exactly the type of judicial oversight that *Wade* * * * forbids as overly intrusive on the prosecution's broad discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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